88-21267

NO.

Supreme Court, U.S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT MURRAY COLLINS AND JOHN RICHARD LUDBROOKE YOUELL, AS REPRESENTATIVES OF CERTAIN UNDERWRITERS AT LLOYD'S LONDON, ET AL

Petitioners

V.

MANSEL J. LAFLEUR,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

PETITION FOR A WRIT OF CERTIORARI

WINSTON EDWARD RICE
Of
RICE, FOWLER, KINGSMILL, VANCE, & FLINT
Poydras Center, Suite 2600
650 Poydras Street
New Orleans, Louisiana 70130
Telephone: (504) 523-2600

Attorneys for Petitioners

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

Questions Presented

(1). Did the Supreme Court of the State of Louisiana err in summarily vacating the summary judgment granted by the Twenty-Fifth Judicial District Court for the Parish of Plaquemines, State of Louisiana and affirmed by the Louisiana Fourth Circuit Court of Appeal without showing any genuine issue of material fact?

(2). Did the Supreme Court of the State of Louisiana err in failing to apply the United States Court of Appeals for the Fifth Circuit's line of jurisprudence which mandates the grant of summary judgment in this case?

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

ROBERT MURRAY COLLINS AND JOHN RICHARD LUDBROOKE YOUELL, AS REPRESENTATIVES OF CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, ET AL

Petitioners*

V.

MANSEL J. LAFLEUR,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

PETITION FOR A WRIT OF CERTIORARI

Robert Murray Collins and John Richard Ludbrooke Youell, as Representatives of Certain Underwriters at Lloyd's, London,

---

*Lloyd's of London is an organization consisting of hundreds of underwriting syndicates which in turn, have hundreds of members. The aforementioned representatives have been nominated by the syndicates

Petitioners, hereby petition the Court to issue a Writ of Certiorari to review the Orders of the Supreme Court of the State of Louisiana entered on March 27, 1989 and April 21, 1989.

OPINIONS BELOW

The Orders of the Supreme Court of the State of Louisiana are reproduced in Appendices A and B, commencing at page A-1. No opinion was rendered by the Louisiana Supreme Court. The Findings of Fact and Conclusions of Law by the Fourth Circuit Court of Appeal are reproduced in Appendix C commencing at page A-5. The Judgment On Motion for Summary Judgment of the Twenty-Fifth Judicial District Court for the

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subscribing to Excess Maritime Employer Liability Policy Nos. CSBM 0284 and 0384 to represent the interested underwriters. Other parties to the proceedings in the Courts below include defendants P & S Well Service No. 5, Inc.; Bo-Mick

Parish of Plaquemines, State of Louisiana is reproduced in Appendix D commencing at Page A-15.

JURISDICTIONAL GROUNDS

The Order of the Louisiana Supreme Court granting Mansel J. LaFleur's Writ of Certiorari and vacating Summary Judgment was entered on March 27, 1989. Petitioners' timely application for rehearing was denied on April 21, 1989. This Honorable Court has jurisdiction to review the Order of the Louisiana Supreme Court pursuant to 28 U.S.C. §1257.

STATUTORY PROVISIONS INVOLVED

46 U.S.C. §688 provides in pertinent part:

Construction Co., Inc., Liberty Mutual Insurance Company, and Gulf Oil Corporation. Based on present information and belief, Gulf Oil Corporation has no interest in the outcome of the petition.

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury...

33 U.S.C. §§903(a) and 902(3)(g) provide in pertinent part:

> Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States...
>
> ...the term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include...
>
> a master or member of a crew of any vessel...

STATEMENT OF THE CASE

The facts giving rise to the litigation can be summarized briefly. On or about October 7, 1985, plaintiff, Mansel J. LaFleur (hereinafter referred to as

"LaFleur") filed a Petition for Damages against his former employer, Bo-Mick Construction Company, Inc. (hereinafter referred to as "Bo-Mick") and others[1] alleging that he sustained injuries on or about October 10, 1984, while walking from the L/B GEAR ELEVATOR to a fixed platform owned by Gulf Oil Corporation (hereinafter referred to as "Gulf"). LaFleur brought suit pursuant to the Jones Act and the General Maritime Law, alleging he was a seaman and a member of the crew of the L/B GEAR ELEVATOR, a vessel neither owned nor operated by his employer.

At the time of the incident in suit, Bo-Mick was performing fixed platform painting and sandblasting services for Gulf pursuant to an agreement between Bo-Mick and Gulf which required Bo-Mick to perform

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1 Supra note at p.1.

various general oilfield construction and maintenance services on Gulf's fixed platforms.

Additionally, at that time, Bo-Mick had procured certain excess maritime employer liability insurance policies. Said policies, which were effective from April 1984 through April 1985, were subscribed to by Certain Underwriters at Lloyd's, London, represented herein by Robert Murray Collins and John Richard Ludbrooke Youell, and are evidenced by Certificates of Insurance Nos. CSBM 0284 and CSBM 0384. Both excess insurance policies provide coverage only for certain claims by Bo-Mick's seaman employees under the Jones Act and the General Maritime Law. However, it is undisputed that these excess maritime policies did not provide coverage

in respect of the claims of Bo-Mick's employees who were not seamen.

On or about July 30, 1987, Bo-Mick filed a contingent third-party petition against Certain Underwriters at Lloyd's, London alleging these excess maritime employer liability policies provided coverage for its Jones Act and General Maritime Law exposure to LaFleur, but only in the unlikely event he was to be found to be a seaman, a fact vigorously denied by Bo-Mick. On or about August 5, 1987, plaintiff filed a First Supplemental and Amended Petition, alleging coverage under these excess maritime employer liability policies for his damage claims and rights of recovery against Petitioners under the Louisiana Direct Action Statute (La. R.S. 22:655).

Shortly after answering said petitions, Petitioners filed a Motion for Summary Judgment on the issue of seaman status. The basis for this Motion was firmly supported by unequivocal testimony by LaFleur that he did not perform any work on the two support vessels which tended the particular Gulf fixed platforms upon which he performed painting and sandblasting. (Depo. of LaFleur, pp. 37, 43, attached hereto as Appendix E at pp. A-18-20). LaFleur was never assigned to either barge nor did he contribute to their functions. Further, Captain Hillery Creel had testified to the fact that LaFleur "never did assist me in nothing". (Depo. of Creel, pp. 53, 57, attached hereto as Appendix F at pp. A-29-31).

Accordingly, on January 15, 1988, the Twenty-Fifth Judicial District Court for

the Parish of Plaquemines, State of Louisiana granted said Motion, finding that LaFleur was not a seaman, and consequently dismissed LaFleur's Jones Act and General Maritime Law claims. However, the lower court specifically reserved unto LaFleur all rights under the Longshoremen's and Harbor Workers' Compensation Act and/or the Louisiana Workers' Compensation Act. This judgment was affirmed on December 13, 1988 by the Louisiana Fourth Circuit Court of Appeal.

On March 27, 1989, the Louisiana Supreme Court summarily vacated the Summary Judgment and on April 21, 1989 summarily denied Petitioners' Application for Rehearing. Petitioners' Motion for Summary Judgment was firmly supported by the uncontroverted record in the trial court and presented no genuine issues of

material fact. Furthermore, the Louisiana Supreme Court's action in vacating Summary Judgment on seaman's status in this case results in a direct conflict with the current position of the United States District Court for The Fifth Circuit on an important admiralty issue. Accordingly, Petitioners seek a Writ of Certiorari to review this improper result.

REASONS FOR GRANTING THE WRIT

I. A WRIT SHOULD BE ISSUED TO DETERMINE WHETHER THE SUPREME COURT OF LOUISIANA ERRED IN SUMMARILY VACATING SUMMARY JUDGMENT ON THE ISSUE OF SEAMAN'S STATUS IN A CASE WHICH PRESENTED NO GENUINE ISSUES OF MATERIAL FACT.

A court may decide that seaman's status is lacking as a matter of law. Barrett v. Chevron U.S.A., Inc., 781 F.2d 1067, 1074 (5th Cir. 1986); White v. Valley Line Co., 736 F.2d 304, 305 (5th Cir. 1984); Wallace v. Oceaneering Intl., 727

F.2d 427, 432 (5th Cir. 1984); Dove v. Belcher Oil Company, 686 F.2d 329, 334 (5th Cir. 1982). As the U.S. Fifth Circuit noted in Barrett, seaman's status may be determined by summary judgment in the appropriate situation:

> Thus, we have held that where the facts establish beyond question as a matter of law the lack of seaman status . . . a court . . . may, in the proper case, hold that there is no reasonable evidentiary basis to support a jury finding that the injured person is a seaman . . . under the Jones Act.

Barrett, 781 F.2d at 1074 (citing Guidry v. Continental Oil Co., 640 F.2d 523 (5th Cir. 1981), cert. denied 454 U.S. 818 (1981)).

In Fayard v. Contifleeting Inc., 511 So.2d 3,4 (La. App. 4th Cir.), writ denied, 514 So.2d 461 (La. 1987), the Louisiana Fourth Circuit Court of Appeal noted:

> While summary judgment on seaman status in Jones Act cases is rarely

> proper, and even in marginal cases should go to the jury, it is in some circumstances possible to rule as a matter of law that a worker is not a seaman, Bouvier v. Krenz, 702 F.2d 89, at 90 (5th Cir. 1983), and the cases cited therein; cf. Pizzitolo v. Electro-Coal Transfer Corp., 812 F.2d 977 (5th Cir. 1987), where the appeals court affirmed the district court's decision on the issue as a matter of law in rendering a judgment notwithstanding the verdict.

The classic test to determine whether a worker has offered evidence sufficient to warrant a jury verdict that he is a seaman was set forth in Offshore Company v. Robison, 266 F.2d 769, 779 (5th Cir. 1959). Judge Wisdom articulated the now traditional test for seaman status as follows:

1. The injured worker must have been "assigned permanently to a vessel . . . or performed a substantial part of his work on the vessel," and

2. The work he performed must have "contributed to the function of the vessel or to the accomplishment of its mission,

> or to the operation or welfare of the vessel in terms of its maintenance." (emphasis added)

This test has been qualified by the U.S. Fifth Circuit time and time again. The term "vessels" has been expanded to include an identifiable fleet of vessels in additional to a single vessel, but the relationship between the injured worker and an identifiable vessel or group of vessels must be "substantial in point and time and nct merely spasmodic." Ward v. Reeled Tubing, Inc., 637 F. Supp. 33, 35 (E.D. La. 1986), aff'd, 811 F.2d 600 (5th Cir. 1987); Bertrand v. Intl. Mooring & Marine, Inc., 700 F.2d 240 (5th Cir. 1983). The permanency requirement mandates that "a claimant must have more than a transitory connection with the vessel or a specific group of vessels." Barrett, supra (citing Ardoin v. J. Ray McDermott Co., 641 F.2d

277, 288 (5th Cir. 1981)). Additionally, it must be proven that the injured worker performed a significant part of his work aboard the vessel, with "at least some degree of regularity and continuity." Keener v. Transworld Drilling, Co, 468 F.2d 729, 732 (5th Cir. 1972). See, e.g. Barrios v. Engine & Gas Compressor Services, Inc., 669 F.2d 350, 353 (5th Cir. 1982); Holland v. Allied Structural Steel Co., 539 F.2d 476, 484 (5th Cir. 1976). The U.S. Fifth Circuit, sitting en banc, has also held that unless a worker's "permanent job assignment" changed before the injury, the relevant time period for assessing his status as a seaman is the entire course of his employment with his current employer. Barrett, 781 F.2d at 1076-77.

Application of this test to the uncontroverted facts of this case illustrates there are no genuine issues as to any material facts and that Petitioners were entitled to Judgment as a matter of law, as was initially decided by the lower court and affirmed by the appellate court. First, LaFleur was never assigned permanently to an identifiable vessel or group of vessels. LaFleur admits that the two vessels with which he had any connection only transported him to his jobsite (on fixed platforms) and carried his equipment. (Depo. of LaFleur, pp. 43, 45, 47, attached hereto as Appendix E at pp. A-19-23). Secondly, LaFleur did not perform any of his work on the vessel, much less a substantial part of his work. In fact, LaFleur has admitted that the actual sandblasting and painting took place on the

fixed platforms. (Depo. of LaFleur, p. 43, attached hereto as Appendix E at pp. A-19-21). Lastly, the record is abundant with evidence that LaFleur never contributed to the function of the vessel in terms of its maintenance, operation and welfare. (Depo. of LaFleur, p. 43, attached hereto as Appendix E at pp. A-19-21; Depo. of Creel, attached hereto as Appendix F at p. A-26). Accordingly, Petitioners assert the question of seaman's status in this case should have been resolved by summary judgment, and the Louisiana Supreme Court erred in summarily vacating the summary judgment since there are no genuine issues of material fact.

II. A WRIT SHOULD BE ISSUED TO DETERMINE WHETHER THE SUPREME COURT OF LOUISIANA ERRED IN SUMMARILY VACATING SUMMARY JUDGMENT ON THE ISSUE OF JONES ACT SEAMAN'S STATUS WHERE SUCH A RULING IS IN DIRECT CONFLICT WITH THE CURRENT POSITION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

It is incumbent upon the Louisiana Supreme Court to follow substantive law as developed in federal cases with respect to cases filed pursuant to 46 U.S.C. §688. Macomber v. De Bardeleben Coal Co., Inc., 8 So.2d 624 (La. 1942), cert. denied 317 U.S. 661 (1942).[2]

Three recent decisions by the United States Court of Appeals for the Fifth

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2 See also Wright v. Ocean Drilling & Exploration Company, 444 So.2d 129, 134-35 (La. App. 4th Cir. 1983); Barboza v. Texaco, Inc., 434 F.2d 121 (1st Cir. 1970); Dixon v. Serodino, Inc., 331 F.2d 668 (6th Cir. 1964); cf. Urie v. Thompson, 337 U.S. 163, 174 (1949).

Circuit[3] conclusively support the proposition that persons whose work activities are in large part performed on fixed platforms do not enjoy seaman's status just because they may have been incidentally involved with a tender vessel which provided support services to the platform. In other words, offshore workers in these settings are deemed to be "permanently assigned" to the fixed platform on which they are working, rather than to the tender vessel with which the prospective claimant may have had incidental contact.

Further, a very recent decision of the United States Court of Appeals for the

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3 See, Longmire v. Sea Drilling Corp., 610 F.2d 1342 (5th Cir. 1980); Golden v. Rowan Companies, Inc., 778 F.2d 1022 (5th Cir. 1985); and Miller v. Rowan Companies, Inc., 815 F.2d 1021 (5th Cir. 1987).

Fifth Circuit mandates the grant of summary judgment in this case.

In Chauvin v. Sanford Offshore Salvage, Inc., 868 F.2d 735 (5th Cir. 1989), Sanford employed the plaintiff as a member of its regular work crew. The plaintiff was generally assigned to Sanford's barge, the SEA SALVOR, and when the SEA SALVOR performed offshore salvage work, he was assigned to that vessel. These assignments were sporadic and unpredictable in both frequency and length. During the gaps between assignments, the plaintiff worked in Sanford's salvage yard and assisted in the repair of the SEA SALVOR. At the time of his accident, the plaintiff was working on the SOUTHERN NO. 6., a barge chartered by Sanford from Southern Shipbuilding Corporation for the purpose of lifting equipment which exceeded

the SEA SALVOR's capacity. On the morning of the accident, the plaintiff had been ordered to assist in transporting equipment from Sanford's yard to the dock and to assist the crew of the SOUTHERN NUMBER 6. While assisting in the rigging of a spreader bar to the crane of the barge, the plaintiff was injured when a pin from a loading sling, weighing approximately 120 lbs., fell onto his foot.

The plaintiff sued his employer, Sanford Offshore, for its negligence, alleging he was a seaman under the Jones Act, and Southern Shipbuilding, the owner of the barge chartered by Sanford, alleging unseaworthiness under the General Maritime Law or negligence under §905(b) of the LHWCA. The district court found that the plaintiff was not a seaman and dismissed the case as against Sanford and its Excess

MEL underwriters, because under the LHWCA, the employer could not have liability to its employee except for compensation and medical. The Fifth Circuit affirmed, relying on its prior decision in Pizzitolo v. Electro-Coal Transfer Corp., 812 F.2d 977, 983 (5th Cir. 1987), cert. denied, ____U.S. _____, 108 S.Ct. 1013, 98 L.Ed. 2d 978 (1988), which clarified the standard for determining whether a plaintiff should be characterized as a Jones Act seaman or a LHWCA longshoreman. The court concluded:

> Although we have on occasion analyzed the question of whether an employee engaged in longshoring or ship repairing was a member of the crew of a vessel under the Robison test, we are persuaded that such an analysis is unnecessary if the employee is engaged in an occupation expressly enumerated in the (LHWCA). Because workmen engaged in certain enumerated occupations are explicitly covered by the LHWCA if they meet the Act's situs requirement, ...these workers were ineligible for consideration as seaman or members of the crew of a vessel entitled to

> Jones Act benefits. Chauvin, supra, at 739, (Emphasis added).

Based on the LHWCA and Pizzitolo, the District Court found, and the Fifth Circuit affirmed, that the plaintiff's activities at the time of his injury as well as his general employment background (loading and unloading cargo and onshore vessel repair) fell within the ambit of the LHWCA, inasmuch as he was engaged in occupations enumerated in the LHWCA. Accordingly, the Fifth Circuit affirmed that Chauvin was not a seaman under the Jones Act.

In Howard v. Rebel Well Service, 632 F.2d 1348 (5th Cir. 1980), the United States Fifth Circuit held that a plaintiff who was employed as a painter and sandblaster at a yard where his employer performed minor repairs on navigable floating barges and who spent approximately ten percent of his time

painting/sandblasting equipment from barge rigs was engaged in maritime employment and met the status requirement of the LHWCA.

The record of the trial court clearly shows that LaFleur was not assigned to any vessels; rather, he was assigned to the fixed platforms upon which he performed his painting and sandblasting work. In his deposition, LaFleur testified that he does not remember ever working off of the barges. (Depo. of LaFleur, p. 43, attached hereto as Appendix E at pp. A-54-55). Additionally, Captain Hillery Creel testified that it was his exclusive duty to navigate and maintain the L/B GEAR ELEVATOR and that LaFleur never assisted him in any of his work. (Depo. of Creel, p. 53, attached hereto as Appendix F, pp. A-64-65). The totality of the record in conjunction with the jurisprudence

indicates that LaFleur was not permanently assigned to any vessel or fleet of vessels nor was he a member of the crew. Rather, he was assigned to the fixed platforms upon which he performed his painting and sandblasting duties. Fixed platforms are treated as artificial islands and, as such, are not vessels. Workers assigned to such platforms therefore do not qualify for seaman status. Bertrand v. Shell Oil Co., 489 F.2d 293, 295 (5th Cir. 1974), Bertrand v. Forest Oil Co., 441 F.2d 809, 811 (5th Cir.), cert. denied, 404 U.S. 863 (1971).

Thus, pursuant to the aforementioned controlling jurisprudence, it is clear that LaFleur is not a Jones Act seaman, but rather a longshoreman or a state worker.

CONCLUSION

Petitioners respectfully request this Honorable Court to grant their Petition for Writ of Certiorari and to order the Louisiana Supreme Court to reverse its prior ruling based on the fact that there is no genuine issue of material fact as to LaFleur's seaman status and the ruling of the Louisiana Supreme Court directly conflicts with the United States Circuit Court of Appeals for the Fifth Circuit's current line of jurisprudence on this important Jones Act issue.

Respectfully Submitted,

WINSTON EDWARD RICE
RICE, FOWLER, KINGSMILL,
VANCE & FLINT
Poydras Center, Suite 2600
650 Poydras Street
New Orleans, Louisiana 70130
Telephone: (504) 523-2600
Attorneys for Petitioners

NO. 88-2126

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT MURRAY COLLINS AND JOHN RICHARD LUDBROOKE YOUELL, AS REPRESENTATIVES OF CERTAIN UNDERWRITERS AT LLOYD'S LONDON, ET AL

Petitioners

V.

MANSEL J. LAFLEUR,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

WINSTON EDWARD RICE
Of
RICE, FOWLER, KINGSMILL, VANCE, & FLINT
Poydras Center, Suite 2600
650 Poydras Street
New Orleans, Louisiana 70130
Telephone: (504) 523-2600

Attorneys for Petitioners

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

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APPENDIX A

THE SUPREME COURT OF THE STATE OF LOUISIANA

MANSEL J. LAFLEUR

VS. NO. 89-C - 0425

P & S WELL SERVICE NO. 5 INC. et al

- - - - - -

IN RE: ROBERT MURRY COLLINS AND JOHN RICHARD LUDBROOKE YOUELL, applying for Rehearing of Writ Granted with Order 3/27/89 to the Fourth Circuit Court of Appeal No. 88CA-0686; 25th Judicial Court No. 38-208 Division A.

- - - - - -

April 21, 1989

Rehearing denied.

LFC

JAD

WFM

JLD

JCW

CALOGERO, J., would grant the rehearing.

Supreme Court of Louisiana
April 21, 1989

Frans J. LaBranche, Jr.
Clerk of Court
For the Court

APPENDIX B

THE SUPREME COURT OF THE STATE OF LOUISIANA

MANSEL J. LAFLEUR

VS. NO. 89-C - 0425

P & S WELL SERVICE NO. 5 INC. et al

- - - - - -

IN RE: LaFleur, Mansel J.; - Plaintiff(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Fourth Circuit, Number 88CA-0686; Parish of Plaquemines 25th Judicial District Court Div."A" Number 28-208

- - - - - -

March 27, 1989

Granted. Summary judgment vacated. Case remanded to trial court for further proceedings.

JCW

JAD

WFM

LFC

CALOGERO, J., would grant and docket for argument.

Supreme Court of Louisiana
March 27, 1989

Frans J. LaBranche, Jr.
Clerk of Court
For the Court

APPENDIX C

MANSEL J. LAFLEUR

VERSUS

P & S WELL SERVICE
NO. 5, INC., ET AL

NO. 89-CA-0686

COURT OF APPEAL

FOURTH CIRCUIT

STATE OF LOUISIANA

APPEAL FROM
TWENTY-FIFTH JUDICIAL DISTRICT
PARISH OF PLAQUEMINES
DIVISION A, NO. 28-208
HONORABLE MICHAEL E. KIRBY, JUDGE

STEVEN R. PLOTKIN
JUDGE

(Court composed of Chief Judge Patrick M. Schott and Judges Robert J. Klees, and Steven R. Plotkin

Plaintiff has appealed from a summary judgment denying his Jones Act claim. We affirm.

Plaintiff Mansel J. LaFleur was injured October 10, 1984, while working as a painter/sandblaster for defendant Bo-Mick Construction Company, Inc. (hereinafter Bo-Mick). He alleges his injuries occurred while he was stepping from a vessel, the L/B Gear Elevator, to the fixed platform on which his duties were performed. He brought suit based upon 46 U.S.C. 688 (the Jones Act) and General Maritime Laws of the United States, or, in the alternative, 33 U.S.C. 901 (the Longshoremen's and Harborworkers' Compensation Act), against Bo-Mick, his employer, P & S Well Service NO. 5, Inc., owner of the vessel; and Gulf Oil Company, Inc., platform owner. He later amended his petition to include

Liberty Mutual Insurance Co., Bo-Mick's insurer, and certain underwriters of Lloyds of London, Bo-Mick's excess coverage insurer. Bo-Mick and Lloyds of London filed motions for summary judgment.

On November 25, 1987, the parties agreed to submit the matter to the trial court on written briefs. On January 15, 1988, judgment was rendered dismissing plaintiff's Jones Act and General Maritime Law claims and reserving to plaintiff his claims under the Longshoremen's and Harborworkers' Compensation Act or Louisiana Worker's Compensation Act.

I.

Mansel J. LaFleur, who worked for Bo-Mick approximately six months prior to the accident, sandblasted and painted fixed platforms owned by Gulf Oil Company in Black Bay, in Plaquemines Parish,

Louisiana. The work did not require that LaFleur stay overnight on a vessel; each morning he met a crewboat which took him to the jack-up barge containing his sandblasting and painting equipment. The barge could move under its own power but it was slow and cumbersome; its primary function was to hold the compressor and sandblasting pots used in maintaining the platforms. When plaintiff left the crew boat and boarded the barge each morning, the barge traveled a short distance and positioned itself adjacent to the platform. The plaintiff's job required that he use an air hose from the barge on the platform and that he go back and forth between the barge and the platform many times a day.

On the day of the accident, the jack-up barge was positioned about four feet above the platform. In going from the

barge to the platform, plaintiff attempted to step onto a piling but slipped and fell to the platform and then into the water. Plaintiff alleges he suffered injuries that have prevented him from working since that time.

Plaintiff argues that summary judgment is rarely proper in Jones Act cases and that it is improper in this case because there is a reasonable evidentiary basis to support a finding that the plaintiff is a seaman.

II.

Under the Jones Act, "any seaman who shall suffer a personal injury in the course of his employment" has a right to claim damages in an action alleging that his employer was negligent. 46 U.S.C.A. section 688. This court recently reviewed the question of when a question of seaman

status could be resolved by summary judgment. In Fayard v. Contifleeting Inc., 511 So.2d 3, 4 (La. App. 4th Cir.), writ denied, 514 So.2d 461 (La. 1987), we noted:

> (w)hile summary judgment on seaman status in Jones Act is rarely proper, and even in marginal cases should go to the jury, it is in some circumstances possible to rule as a matter of law that a worker is not a seaman. Bouvier v. Krenz, 702 F.2d 89, at 90 (5th Cir. 1983), and cases cited therein; cf. Pizzitolo v. Electro-Cool Transfer Corp., 812 F.2d 977 (5th Cir.1987), where the appeals court affirmed the district court's decision on the issue as a matter of law in rendering a judgment notwithstanding the verdict.

As in Fayard, here the facts of the plaintiff's duties are not in dispute and the only issue is whether the facts meet the requirements for seaman status.

The test for seaman status was established in Offshore Company v.

Robison, 266 F.2d 769, 779 (5th Cir., 1959). The Robison court stated:

> there is an evidentiary basis for a Jones Act case to go to the jury: (1) if there is evidence that the injured workman was assigned permanently to a vessel ... or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips.

Recently the Robison test was reaffirmed in Barrett v. Chevron, U.S.A., Inc., 781 F.2d 1067 (5th Cir. 1986).

Applying the Robison test to the case at hand, we find that LaFleur did not satisfy the first element of the standard. LaFleur admitted in his deposition that all his work was done on fixed platforms and he had no duties on the barge. The fifth Circuit in Kirk v. Land & Marine

Applicators, Inc., 555 F.2d 481 (5th Cir. 1977), addressed the question of whether a sandblaster/painter working on a fixed platform was a seaman for Jones Act purposes. The court found that although the plaintiff had incidental ties to a support vessel (he lived aboard one), his principal duties as a sandblaster and painter were performed on the fixed platform and therefore he did not satisfy the first element of the Robison test. The plaintiff in Kirk had a stronger tie to a vessel than LaFleur because he ate, slept and did minor chores aboard it; LaFleur's only relationship with the vessel was that it provided him with transportation to the platform and storage space for his gear.

Moreover, recent cases have held that workers whose duties occur primarily on fixed platforms are not to be considered

seaman on the basis of their connection with vessels offering mainly support services for the platform. Longmire v. Sea Drilling Corp., 610 F.2d 1342 (5th Cir. 1980) (a roughneck assigned to a drilling platform who occasionally performed tasks on the support vessel was not a seaman even though he was injured while stowing the anchor chain); Billings v. Chevron, U.S.A., INC., 618 F.2d 1108 (5th Cir. 1980) (a roustabout on a fixed platform rig whose duties included loading and unloading tenders onto the platform was not a seaman); Golden v. Rowan Companies, Inc., 778 F.2d 1022 (5th Cir. 1985) (worker who maintained motors on a rig and performed various jobs of short duration on a vessel was denied seaman status); Miller v. Rowan Companies, Inc., 815 F.2d 1021 (5th Cir. 1987) (worker whose job entailed retrieving

drilling tools from a well and who lived aboard an adjacent vessel which served as bunkhouse for the crew was not a seaman).

Because plaintiff fails to meet the first element of the Robison test--that he was assigned permanently to a vessel or performed a substantial part of his work on a vessel--and therefore cannot be considered a seaman for purposes of the Jones Act, it is not necessary for us to examine the second element of Robison.

Accordingly, the judgment of the district court is affirmed.

AFFIRMED

APPENDIX D

TWENTY-FIFTH JUDICIAL DISTRICT COURT

PARISH OF PLAQUEMINES

STATE OF LOUISIANA

NO. 28-208 DIVISION "A"

MANSEL J. LAFLEUR

VS.

P & S WELL SERVICE #5, INC., ET AL

FILED: JAN 15, 1988 Candace Dufrene
DEPUTY CLERK

JUDGMENT ON MOTION FOR SUMMARY JUDGMENT

This matter was set for hearing on November 25, 1987. All parties agreed to submit the matter.

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of Robert Murray Collins and John Richard Ludbrooke Youell, as representative of

Certain Underwriters at Lloyd's London severally subscribing each for himself and not one for the other, to certain maritime employer's liability coverage, and against plaintiff Mansel J. LaFleur finding that said plaintiff is not a seaman within the meaning of the Jones Act or the General Maritime Law of the United States and dismissing those claims of plaintiff as to all defendants.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of defendant Bo-Mick Construction Company, Inc. and against plaintiff, Mansel J. LaFleur, dismissing the plaintiff's Jones Act and General Maritime Law claims as to Bo-Mick Construction Company, Inc., specifically reserving to plaintiff any claim he may have under the Longshoreman's

and Harbor Worker's Act, or the Louisiana Worker's Compensation Act, or both, if any.

JUDGMENT READ, RENDERED AND SIGNED at Pointe-ala-Hache, Louisiana this 15th day of January, 1988.

M. Kirby
J U D G E

APPENDIX E

Excerpts from Deposition of MANSEL J. LAFLEUR

Deposition of LaFleur - page 37

captain in jacking the barge up?

A. No.

Q. Did you ever assist in tying the barge up or untying the barge?

A. Huh-uh (negative response).

Q. You have to say yes or no.

A. No.

Q. Did you ever work on the engines on the barge?

A. No.

Q. Did you ever clean or paint the barge?

A. No.

Q. Did you ever do any work on the barge, other than work on Bo-Mick's equipment that would be on the barge? In

other words, did you ever do any mechanic's work on the barge or help the captain with anything?

A. No.

Q. Did you every drive the barge, steer the barge anywhere?

A. No.

Q. I suppose you would take your lunch on the barge during the day?

Deposition of LaFleur - page 43

Q. Are the structures pretty close together out there?

A. Yeah, they're not far apart.

Q. And the work on all of these was sandblasting and then painting; is that correct?

A. Yes.

Q. Now, as far as the crewboat ride, you didn't have to drive the crewboat at all, did you.

A. No, sir.

Q. Now, the sandblasting and painting work that you did on the structures during the time you worked for Bo-Mick in the Black Bay field, did you ever have to work on the barge itself, stand on the barge itself to do the work on the platform, or did you get off of the barge to do your work?

A. Most of the time you just -- you don't work on the barge. You have to paint on the platform. I don't remember ever working off of the barge to get to nothing.

Q. Now, when you got to a

small two-gallon paint pot. We had to take them on the platform with us.

Q. As far as the sandblasting is concerned, the sandblast pots and the compressor would remain on the barge?

A. Yes, sir.

Q. And I suppose there would be rubber hoses that went across to the platform, to the guns themselves?

A. Right.

Q. Did the helper ever do any sandblasting or painting?

A. No.

Q. Was his job just to keep the pots filled and make sure the equipment was running?

A. Yes, sir. He shoveled sand, he tailed our paint lines, helped us tape gauges and stuff, and then when we sandblasted, he had to run the pot on the barge.

Q. So he would make sure the pot was full of sand?

A. Yeah, fill it up and turn it on and off.

Deposition of LaFleur - page 47

Q. When did you do that? That's something you had a regular time every day that you would do it?

A. When sandblasting, we usually stop a couple of hours before knock off time to blow it down. We blow it down with the hose as much as we could.

Q. By blowing it down, you mean the structure you just got done sandblasting?

A. Yes, so we could paint it. And sometimes if it was too heavy, we had to shovel it off of there. We done that every day. But we both done it. I helped him do it.

Q. What about the sand that got on the barge during the operation? I'm sure some sand must have blown on the barge. Who cleaned that?

A. The skipper, as far as I know, he would wash it. I mean I don't know. I never did clean it.

Q. All right. Now, at the time of the accident or the day of the accident, do you know the name or the number of the

A. She's married to him, yes.

MR. WARD:

Thank you very much, Mr. LaFleur.

EXAMINATION BY MR SACKS:

Q. I have just a few questions for you, please. Did you state that you had been working for Bo-Mick approximately six months by the time you had this injury?

A. Yes.

Q. All right. And during that six months, can you give me a general

description of the kind of work you were doing there?

A. Sandblast and paint.

Q. Was all the sandblasting and painting you did in connection with oil field type projects?

A. Yes, sir.

Q. Was the work that you did only for Gulf or was there work for other oil companies, as well?

A. As far as I can remember, it was for Gulf, Gulf Oil.

Deposition of LaFleur - page 130

Q. And did it consist mostly of painting and sandblasting offshore production facilities?

A. Yes.

Q. How did you learn of where you had to go or what particular platforms had to be painted?

A. Them boat captains knows the name of them platforms and how to get to them, and that's how we -- I mean I'm not navigator.

Q. Where would you report in the mornings, generally speaking? Would you go to the Bo-Mick office every morning?

A. No, sir, we would go to the boat docks in Buras where they dock their crewboats and catch our boat there every morning, and it let us back down that night.

Q. I'm a little confused about the situation of the structure and the barge. Now, you suggested that the little porch was about five steps or so below the main deck of the platform; is that correct?

APPENDIX F

Excerpts from Deposition of CAPTAIN CREEL

Deposition of Creel - page 8

or could you describe that for me?

A. Sometimes we'd come in, and sometimes we'd stay out. It's just according to how the weather was.

Q. You had quarters, sleeping quarters, on the --

A. No. We come home every night with a crew boat.

Q. There are no facilities on that barge to sleep?

A. No, sir.

Q. What about a galley? Does it have that?

A. No. It don't have anything. Just a little house on it.

Q. You say at the present time this barge is being used for welding support?

A. Right now. We've got a welder on there working for Chevron out there right now.

Q. Does the barge have a name?

A. Yes. GEAR ELEVATOR.

Q. Is that like a gear on a car?

A. GEAR ELEVATOR.

Q. Is that on the bow of the barge or

Deposition of Creel - page 10

particular platform was from the headquarters?

A. I guess a couple of thousand yards, I imagine.

Q. How did you get back and forth to work each day?

A. Well, sometimes on my barge and

sometimes a crew boat would pick us up if I had to leave my barge on location.

Q. Did you go back and forth on this jack-up barge to work?

A. Well, at times, yeah, if I didn't leave it on location.

Q. Was your normal routine to leave it on location until you completed a job?

A. No. It was left up to us, if we wanted to leave it there or take it in.

Q. Well, at the time Mr. LaFleur was working there, did ya'll normally leave it on the platform site at night?

A. No, not particularly.

Q. Could you give me an idea, say, in the previous -- the week prior to this accident how many times you may have

Q. Yes. That particular platform that you were working on.

A. About two or three minutes from the barge. Maybe four. Something like that.

Q. And would Mr. LaFleur ride on the GEAR ELEVATOR during that trip?

A. Right.

Q. Did he assist you in positioning the GEAR ELEVATOR next to the platform?

A. No, sir. He never did assist me in nothing.

Q. That would be your docking maneuvers yourself?

A. Right.

Q. And there is no need to tie off or anything, you just start spudding down?

A. That's right.

Q. What would he do during that period when you were traveling from the wirehouse to the platform?

A. Oh, he would set in the cabin with me then and maybe stand outside, you know.

Deposition of Creel - page 57

A. Right.

Q. And with Bo-Mick?

A. Right.

Q. Did Mr. LaFleur or his helper ever assist you in any of the operation of the barge?

A. No, sir. Never did.

Q. To your knowledge, is the only work that they were involved in was the painting and sandblasting of the platform?

A. Right.

MR. SACKS:

That's all I have.

Thank you.

BY MR. WRIGHT:

Q. What is your source of information about the GEAR ELEVATOR working for Gulf and then getting laid off? How do you know about that?

A. Well, they run out of work for us out there.

Q. But how do you know that; from Mr. Ritchie?

A. Right. Well, they tell me. They tell

(3)

Supreme Court, U.S.
F I L E D
JUL 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-2126

In The

Supreme Court of the United States

October Term, 1988

ROBERT MURRAY COLLINGS AND JOHN RICHARD LUDBROOKE YOUELL, AS REPRESENTATIVES OF CERTAIN UNDERWRITERS AT LLOYDS LONDON, ET AL.,

Petitioners,

v.

MANSEL J. LAFLEUR,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

NORMAN L. WILLIAMS
Attorney at Law
203 W. Clarence Street
P.O. Drawer 3265
Lake Charles, La. 70602
(318) 478-8888

and

ROBERT C. MCCALL
Of
BAGGETT, MCCALL & BURGESS
(A Professional Law Corporation)
3006 Country Club Road
P.O. Drawer 7820
Lake Charles, La. 70606-7820
(318) 478-8888

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

(1). Was the Supreme Court of Louisiana correct in vacating Summary Judgment on the issue of seaman status?

(2). Did the Louisiana Supreme Court correctly apply the applicable substantive Federal law?

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SUMMARY OF THE ARGUMENT

This is a Jones Act, 46 USC 688 case in which the trial court decided the question of seaman status on a Motion for Summary Judgment which was affirmed by the Appellate Court. The Louisiana Supreme Court vacated the Summary Judgment and remanded the case to the trial court for further proceedings.

The action of the Louisiana Supreme Court is consistent with the jurisprudence of the U.S. 5th Circuit regarding Jones Act cases, i.e., that rarely is Summary Judgment proper in a Jones Act case and even marginal cases should go to the trier of fact.

There is an evidentiary basis for a Jones Act case to go the jury:

1. If there is evidence that the injured workman was assigned permanently to a vessel . . . or performed a substantial part of his work on the vessel; and
2. If the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or the accomplishment of its mission. . . .

Offshore Company v. Robison, 266 F.2d 769 (5th Cir. 1959).

A review of the factual scenario in this case indicates that there is ample evidence that LaFleur was permanently assigned to a vessel as he at all times during his employment worked from one of two jackup barges. The evidence shows that the vessel was a special purpose vessel, not primarily used for navigation, but used to support the painting and sandblasting operations. All of the equipment used in the operations were located on and run from the vessel.

We submit that under the relatively undisputed facts in this case, a reasonable man would infer that LaFleur was permanently assigned to a vessel or a fleet of two vessels and that his mission contributed to the mission of the vessel. The Louisiana Supreme Court was correct in vacating and remanding, even though the evidence was largely undisputed, a jury should get the chance to draw the inferences from that evidence.

STATEMENT OF THE CASE

Mansel J. LaFleur was injured October 10, 1984 while working for Bo-Mick Construction Company, Inc., (A-1). Plaintiff's employer was performing maintenance work on small fixed platforms in Black Bay, in the coastal waters of Plaquemine Parish, Louisiana.

LaFleur was a painter/sandblaster who sandblasted platforms and then painted them (A-2). He had worked for Bo-Mick approximately six months at the time of the accident (A-1). Plaintiff's work was conducted from a jackup barge on which the air compressor, sand pots, sand and paint were located (A-6). The barge would move across water with its legs jacked up. It would pull along side the platform to be worked on and would jack the legs into the mud and elevate the top of the barge to the level of the platform (A-8). The painter would then move onto the platform where the actual sandblasting and painting took place (A-8). The air hoses that the painter/sandblaster used were connected to the compressor on the jackup barge (A-9). The painter's helper

generally remained on the barge and ran the compressor and kept supplying sand or paint.

Normally, no gang plank was used, as the barge would position itself at the same level as the adjacent deck of the fixed platform (A-11). The painter would step from the vessel to the platform, much like stepping off an elevator in a building (A-11). In fact, the name of this vessel was the GEAR ELEVATOR (A-20).

At the time of the accident, however, the vessel was about four feet above the deck of the platform (A-10). To get off the vessel, the plaintiff had to step on a piling as an interim position and then step from the piling to the deck of the platform. As the plaintiff was stepping onto the piling, he slipped and fell to the deck of the platform and then on into the water (A-14). As a result of the fall, plaintiff suffered back injuries and was immediately brought into port and has been unable to work since that time leading to the instant lawsuit.

The vessel had a three man crew; the painter/sand-blaster, LaFleur, and his helper, Donald Dean (A-18), and the captain, Hillery Creel, who handled the navigation duties (A-18). The vessel was owned by P&S Well Service, who employed Mr. Creel (A-18). During the six months that the plaintiff had worked for Bo-Mick, LaFleur had been assigned to only two barges, one of these being the GEAR ELEVATOR. The second vessel was a larger barge used with a larger painting crew (A-5). At all times he worked from a barge. As Mr. LaFleur put it, "Get through with one platform, we just moved to another." (A-3)

On normal work days, LaFleur would drive to a dock in Buras, Louisiana, where a crew boat would transport

him to the jackup barge where his daily work would commence (A-15). The jackup barge was self-propelled and was able to move from platform to platform, but it was a slow and cumbersome type vessel. The transportation function was incidental to the GEAR ELEVATOR whose primary purpose was to support the painting and sandblasting operations.

All of the equipment, compressors, sand, sand pots, paint and supporting hoses were located on the jackup barge (A-19). Without the vessel and the equipment located thereon, the painting and sandblasting could not be conducted. During the course of a day, LaFleur would go back and forth between the jackup barge and the platform as many as forty to fifty times. (A-16). In the performance of his work, Mansel LaFleur would remain attached to the GEAR ELEVATOR by an air hose similar to the way a diver is attached to a support vessel when the diver goes under water.

QUESTION #1

WAS THE SUPREME COURT OF LOUISIANA CORRECT IN VACATING SUMMARY JUDGMENT ON THE ISSUE OF SEAMAN STATUS?

In deciding whether there are genuine issues of material fact, any doubt is to be resolved against the granting of Summary Judgment and in favor of a trial on the merits. *Sanders v. Hercules Sheet Metal,* 385 So.2d 772 (La. 1980).

Inferences drawn from facts in a record must be viewed in a light most favorable to opposition to a

Motion for Summary Judgment. *Daret v. Halmar Const. Co.*, 505 So.2d 69 (La. App. 4th Cir. 1987); *Vermilion Corp. v. Vaughn*, 397 So.2d 490 (La. 1981).

Summary Judgment on seaman's status in Jones Act cases is rarely proper, and even marginal cases should go to the jury. *Bouvier v. Krenz*, 702 F.2d 89 (5th Cir. 1983); *Prinzi v. Keydril Co.*, 738 F.2d 707, 708-09 (5th Cir. 1984); *Abshire v. Seacoast Products, Inc.*, 668 F.2d 832, 837 (5th Cir. 1982); *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370, 374, 77 S.Ct. 415, 417, 1 L.Ed.2d 404, 408 (1957).

There is an evidentiary basis for a Jones Act case to go to the jury: (1) if there is evidence that the injured workman was assigned permanently to a vessel . . . or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or the accomplishment of its mission . . . " *Offshore Company v. Robison*, 266 F.2d 769, 779 (5th Cir. 1959).

In *Ardoin v. J. Ray McDermott & Co.*, 641 F.2d 277 (5th Cir. 1981) the court stated at page 280:

> "We think that in this case, as in many similar ones, the riddle [the status of various types of ambiguous – amphibious workers involved in the offshore petroleum industry] is not for us to answer. We have sometimes described the problem presented by the issue of seaman's status as a mixed question of law and fact, *Holland v. Allied Structural Steel Corp., Inc.*, 539 F.2d 476 (5th Cir. 1976); *Kenner v. Transworld Drilling Co.*, 468 F.2d 729 (5th Cir. 1972). It may be more helpful to describe the issue as one whose

> resolution requires "the application of legal principles to specific underlying facts about what the parties did or did not do." *Longmire v. Sea Drilling Corp.*, 610 F.2d 1342 (5th Cir. 1980). Regardless of the way in which the process of determining whether a particular plaintiff is a Jones Act seaman is described, it is clear that except in cases where the underlying facts are undisputed, *and the record reveals no evidence from which reasonable persons might draw conflicting inferences* about these facts, the riddle of seaman's status is one for the jury. (See cases cited herein). emphasis supplied, bracketed material supplied

We submit that under the relatively undisputed facts set forth above, a reasonable man would infer that LaFleur was permanently assigned to a vessel or a fleet of vessels and that his mission contributed to the mission of the vessel. Even if that would not be *your* inference, it would not be an unreasonable inference.

The defendants argue that the man was assigned to the platform, however, the pattern of work indicated that the man remained on the vessel and the vessel moved from one platform to another. The permanent assignment was to the vessel not to any particular platform. The painting operations would last a few days and the boat and crew would move on to another platform.

Petitioners contend that "LaFleur did not perform any of his work on the vessel" . . . (Petitioner's brief p. 15). The question was:

> "Q. Now, the sandblasting and painting work that you did on the structures during the time you worked for Bo-Mick in the Black Bay field, did you ever have to work on the barge itself, *stand on the barge itself to do the work on the platform*, or did you get off the barge to do your work? (emphasis supplied)

> A. Most of the time you just – you don't work on the barge. You have to paint on the platform. I don't remember ever working off of the barge to get to nothing."

It is clear from the totality of the testimony that a substantial part of the painter's activities such as preparation and cleanup took place on the vessel. Why else would the painter be going back and forth from platform to vessel 40 or 50 times a day? (A-16).[1]

On motions for Summary Judgment, inferences most favorable to the opponent of the motion are to be entertained. With that guidance, the favorable inference is permanent assignment to the vessel and not the platform. The actions of the Louisiana Supreme Court are in perfect accord with the applicable decisions, i.e., the *Robison* test.

QUESTION #2

DID THE LOUISIANA SUPREME COURT CORRECTLY APPLY THE APPLICABLE SUBSTANTIVE FEDERAL LAW?

The Louisiana Supreme Court was in accord with applicable Federal law and jurisprudence in vacating Summary Judgment to allow the jury to decide seaman

[1] We believe that the only reasonable inference adverse to the plaintiff to be distilled using the *Robison* test is that the plaintiff did perform a substantial part of his work off the vessel. While that inference is valid, it does not destroy seaman's status for the plaintiff. The plaintiff must prove either permanent assignment to a vessel *or* substantial work on the vessel. *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067, 1073 (5th Cir. 1986), confirms that the test is disjunctive.

status. We acknowledge the correctness of petitioner's assertions that the Louisiana Supreme Court should apply substantive Federal law in a seaman's case. However, the Louisiana Supreme Court did exactly that and corrected the error made by the lower Louisiana courts.

Congress, the U.S. Supreme Court, and the U.S. 5th Circuit Court of Appeals have all indicated that seaman status in a Jones Act case should be decided by the jury and it is rarely appropriate to decide status on a Motion for Summary Judgment. *Bouvier v. Krenz*, 702 F.2d 89 (5th Cir. 1983); *Prinzi v. Keydril Co.*, 738 F.2d 707, 708-09 (5th Cir., 1984); *Abshire v. Seacoast Products, Inc.*, 668 F.2d 832, 837 (5th Cir. 1982); *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370, 374, 77 S.Ct. 415, 417, 1 L.Ed.2d 404, 408 (1957); *LeGros v. Panther Services Group, Inc.*, 863 F.2d 345 (5th Cir. 1988, p. 351).

Petitioners argue that three Fifth Circuit decisions conclusively support their position. *Longmire v. Sea Drilling Corp.*, 610 F.2d 1342 (5th Cir. 1980), *Billings v. Chevron, U.S.A., Inc.*, 618 F.2d 1108 (5th Cir. 1980), and *Golden v. Rowan Companies, Inc.*, 778 F.2d 1022 (5th Cir. 1985) cited in petitioners' brief all involve oil field hands assigned to a *fixed drilling platform;* Longmire being a roughneck, Billings a roustabout and Golden a motorman. The drilling cases clearly indicate that the inquiry is to the type of drilling rig. Assuming the platform is outside of Louisiana waters, if it is a fixed platform, they will be L&H workers. If the drill platform is a vessel, they will be a Jones Act seaman. *Gianfala v. Texas Co.*, 350 U.S. 879, 76 S.Ct. 141, 100 L.Ed. 775 (1955). Eating, sleeping or incidental activities on board a tender will not change the nature of their job. These mens' mission is drilling and if

the drill rig is a vessel, they are seamen. Similarly, LaFleur's mission was painting/sandblasting and the rig used was a vessel.

Petitioners also argue that the recent U.S. 5th Cir. decision in *Chauvin v. Sanford Offshore Salvage, Inc.*, 868 F.2d 735 (5th Cir. 1989) mandates the grant of Summary Judgment. To the contrary, *Chauvin* and its predecessor, *Pizzitolo v. Electro-Coal Transfer Corp.*, 812 F.2d 977 (5th Cir. 1987), deal with persons covered by the Longshoreman and Harbor Worker's Act, 33 U.S.C. 901, et seq. It is clear that Mansel LaFleur was not engaged in typical Longshoreman activities (loading or unloading ships) or traditional Harbor Worker activity (ship repairs). Neither would he be covered under the provisions of the Outer Continental Shelf Lands Act, 43 U.S.C. 1333 governing platform workers as this platform is located in Louisiana waters. *Herb's Welding Inc. v. Gray*, 470 U.S. 414, 105 S.Ct. 1421, 84 L.Ed.2d 406 (1985).

The *Pizzitolo* decision approaches status by looking first to see if a man is an L&H worker and if he is, never reaching the *Robison/Barrett* analysis for seaman status. *LeGros v. Panther Services Group, Inc.*, 863 F.2d 345 (5th Cir. 1988) states that you still use a *Robison/Barrett* analysis. The *Chauvin* Court at footnote 14 indicated they had approached the status analysis using both the *Pizzitolo* and *Robison/Barrett* methods.

The U.S. 5th Circuit Court of Appeals has wrestled with the status of various personnel on barges on a number of occasions. *Davis v. Hill Engineering*, 549 F.2d 314 (5th Cir. 1977) involved a welder's helper who was injured aboard a barge while assisting an installation of

metering facilities at an offshore gas gathering station. He was found to be a seaman. *Kirk v. Land and Marine Applicators, Inc.*, 555 F.2d 481 (5th Cir. 1977) involved a painter/sandblaster working off of a vessel on a fixed platform. The district court denied seaman status on a motion for Summary Judgment without addressing the question of permanent assignment to the vessel. The appellate court affirmed stating at Page 483:

> "The record demonstrates, however, that the defendant maintained four vessels to support platform sandblasting work. Painters and sandblasters, such as Kirk, were not specifically assigned to any one of the four."

Apparently the court in *Kirk* failed to consider, or the doctrine developed later, that the four vessels that Kirk could be assigned to may constitute an identifiable fleet of vessels. *Davis v. Hill Engineering*, 549 F.2d 314 (5th Cir., 1977), *Ardoin v. J. Ray McDermott & Co.*, 641 F.2d 277 (5th Cir. 1981), *Bazile v. Bisso Marine Co., Inc.*, 606 F.2d 101 (5th Cir. 1979), *Higginbotham v. Mobil Oil Corp.*, 545 F.2d 422 (5th Cir. 1977).

Ardoin v. J. Ray McDermott & Co., 641 F.2d 277 (5th Cir. 1981) dealt with a structural welder who worked from a fleet of derrick barges. The *Ardoin* court refused to try to reconcile *Kirk* and *Davis* and instead stated at page 282:

> "The factual distinctions between *Kirk* and *Davis* and the instant case are, finally, insignificant ones. Kirk would normally stay offshore only 14 days; Davis, on the occasion of his injury, was expected to remain offshore 20-30 days but actually stayed only two or three days. Kirk sometimes was quartered on the platform, rather than on the vessel, whereas Ardoin

> and Davis apparently never stayed on a platform; but, it is now clear that merely sleeping and eating aboard a support vessel while working on a fixed platform does not make one a seaman if one does not otherwise meet the *McKie/Robison* criteria. See e.g., *Owens v. Diamond M Drilling Co.*, 487 F.2d 74 (5th Cir. 1973). Nor does a failure to do so deprive one of seaman's status if these criteria are otherwise met. See e.g., *Producer's Drilling Co. v. Gray*, 361 F.2d 432 (5th Cir. 1966). Thus, this distinction hardly seems definitive. Davis was injured while on the vessel, Kirk and Ardoin were injured on fixed structures; however, the site of one's injury does not effect recovery if one is in fact, a seaman. *Higginbotham v. Mobile Oil Corp.*, 545 F.2d 422 (5th Cir. 1977); *Noble Drilling Co. v. Smith*, 412 F.2d 952 (5th Cir. 1969). We find ourselves confronted here with a case that bears a strong resemblance to two of our previous cases, which, despite their resemblances to one another, came to divergent results and would appear to support different resolutions of this one. In such circumstances, *we can only follow the teaching of the case which appears to reflect sounder reasoning and supports a result more consistent with the general principle that the question of seaman's status in a Jones Act case is ordinarily one for the jury.* In this instance, that case is Davis". (emphasis supplied).

Likewise in the instant case where a trio of barge worker cases reach inconsistent results the *LaFleur* case should go to a jury. Certainly *Davis, Kirk* and *Ardoin* suggest that reasonable men may reach different inferences from similar underlying facts and thus disagree on the results.

The heart of the painting and sandblasting activity was on the vessel. The air compressors, sand, sand pot and often times, the paint pot, were contained on the barge. The painter – sandblaster while working on the fixed platform, was connected back to the vessel with his

air hoses. LaFleur's helper was physically located on the barge most of the time. He was supporting LaFleur's activities.

The relationship of the barge to the painting and sandblasting activities is similar to a fireman working from a pumper truck. The truck is the hub of the fire fighting activities, although the actual fire fighting will be done off of the truck except in the unlikely event you are trying to put a fire out on the fire truck itself. Likewise, the center of the painting/sandblasting activity is the barge. However, unless you are painting or sandblasting the barge itself, the actual work will take place off of the barge. During LaFleur's entire employment, all of the painting and sandblasting was done with the use of a barge. It is not clear in the *Kirk v. Land & Marine Applicators, Inc.*, supra, whether the sandblasting could have been performed without the presence of the vessel.

Deep sea divers have been found to be seamen, although diving will be done off of the vessel. Similar to the painter/sandblaster, they are generally connected back to the vessel with air hoses. *Wallace v. Oceaneering Intern.*, 727 F.2d 427 (5th Cir. 1984), *Pickle v. International Oilfield Divers, Inc.*, 791 F.2d 1237 (5th Cir. 1986).

It is clear that the Louisiana Supreme Court action i.e., allowing the question of seaman status to be resolved by a jury is in accord with the applicable substantive law.

CONCLUSION

We respectfully urge that the Louisiana Supreme Court was correct in remanding this matter to have a jury decide the question of seaman status. We respectfully request that the writ of certiorari be denied.

Respectfully Submitted,

NORMAN L. WILLIAMS
Attorney at Law
203 W. Clarence Street
P.O. Drawer 3265
Lake Charles, La. 70602
(318) 478-8888

and

BAGGETT, MCCALL & BURGESS
(A Professional Law Corporation)

By: _____
ROBERT C. MCCALL
3006 Country Club Road
P.O. Drawer 7820
Lake Charles, La. 70606-7820
(318) 478-8888

No. 88-2126

In The

Supreme Court of the United States

October Term, 1988

ROBERT MURRAY COLLINGS AND JOHN RICHARD LUDBROOKE YOUELL, AS REPRESENTATIVES OF CERTAIN UNDERWRITERS AT LLOYDS LONDON, ET AL.,

Petitioners,

v.

MANSEL J. LAFLEUR,

Respondent.

APPENDIX TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

NORMAN L. WILLIAMS
Attorney at Law
203 W. Clarence Street
P.O. Drawer 3265
Lake Charles, La. 70602
(318) 478-8888

and

ROBERT C. MCCALL
Of
BAGGETT, MCCALL & BURGESS
(A Professional Law Corporation)
3006 Country Club Road
P.O. Drawer 7820
Lake Charles, La. 70606-7820
(318) 478-8888

Attorneys for Respondent

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(p. 18) **APPENDIX A**

Q. When is the last day that you worked prior to today?

A. I haven't worked since I got hurt. I think that was October the 10th.

Q. 19 what?

A. Last year. '84, I think. It would have been a year and four months.

Q. So it would have been October 10th, 1984?

A. Right.

Q. And at that time, you were working for Bo-Mick?

A. Yes.

Q. And your job with Bo-Mick was titled what?

A. Painter.

Q. And how long did you work for Bo-Mick before the accident?

A. About six months.

Q. So that would put it sometime around the spring of 1984 that you went to work for Bo-Mick?

A. That's right.

Q. Before you worked for Bo-Mick, who did you work for?

* * *

(p. 25) Houston and also Lake Charles. Done some work in Baton Rouge for them. It was all over. Big company.

Q. What type of painting work have you done over the years?

A. It's mostly been spraying, plant work, plants, sandblasting, painting, mostly high work, tanks.

Q. Have you ever been a sandblaster?

A. Yeah, that goes with the painting, sandblasting and paint.

Q. And who hired you at Bo-Mick?

A. Jessie Davis.

Q. When you went to work for Bo-Mick, did you have to have a physical examination?

A. No.

Q. What about when you worked for Foster Wheeler?

A. No.

Q. Had you ever been fired from any jobs that you had?

A. No.

Q. What is Mr. Davis' title at (p. 26) Bo-Mick?

A. He's a foreman.

Q. And what job did you hire on to do? Sandblasting and painting, obviously?

A. Offshore.

Q. Offshore?

A. Yes.

Q. Was this the first time you had ever been offshore?

A. Oh, no, I worked out there many times.

Q. During the months that you had worked for Bo-Mick, did you work in the same area or did they spread you out and work you in different fields and different locations?

A. Well, we was working off of a jack-up barge. Get through with one platform, we just moved to another one.

Q. You say you were working off of a jack-up barge. Was it the same jack-up barge?

A. No, the one I first went on there, it was a bigger barge.

(p. 27) Q. What was the name of the first jack-up barge you worked on for Bo-Mick?

A. I just don't remember. I don't remember the name of it.

Q. How many different jack-up barges did you work on during the entire time you worked for Bo-Mick?

A. Two.

Q. Do you remember the second jack-up barge's name?

A. No.

Q. Did Bo-Mick own the barges that you worked off of?

A. No, sir, it was under lease.

Q. Do you know who owned them?

A. P & S, I think. P & S.

Q. And all your work was done with relationship to these barges? There wasn't a time you were just sent out to a platform to work, or did you always go out on the barge?

A. We always worked off of a barge.

Q. What was your work schedule? In other words, how many days a week did (p. 28) you work?

A. We worked as long as we could see out there, seven days a week.

Q. So you would work from sun-up till –

A. Yes, as long as we could see. 15, 16 hours a day.

Q. And how much did they pay you? Was it by the hour?

A. I think it was $7.50 an hour.

Q. I suppose you got overtime after so many hours?

A. Yes.

Q. What was that?

A. After 40 hours.

Q. Did you work seven days a week for six months? In other words, you worked consistently?

A. Only time I got off is when I would go home, maybe take a weekend off, take two, three days off, about all.

Q. So Bo-Mick had enough work to keep the crew busy consistently? There wasn't any time where you could knock off for a month or a week or two weeks?

(p. 29) A. Whenever the weather gets bad, they knocked off most of the people and they would keep me and work me in the yard I worked a little while in the yard.

Q. Did you work with a regular crew when you were working with Bo-Mick?

A. Yes, sir.

Q. Can you tell me how many men were in the crew, men or ladies were in the crew?

A. Well, on the big barge, it was five men and the foreman.

Q. How about on the little barge?

A. It was myself and a helper, plus the captain on the barge.

Q. Now, at the time of your accident, were you working with the little barge or the big barge?

A. The small barge.

Q. So why don't you tell me the name of the helper that was with you.

A. I don't remember his name.

Q. He was employed by Bo-Mick?

A. Yes.

Q. And who was the captain? What

* * *

(p. 35) Q. So the crewboat would make the rounds and pick you up off the barge and bring you to Venice, right?

A. Yes.

Q. What kind of equipment was on this barge, on the deck of this barge?

A. Well, we had an air compressor.

Q. Who owned that? Was that the owner of the barge or was that Bo-Mick?

A. Well, Bo-Mick owned it.

Q. What else?

A. A sand pot.

Q. Is that Bo-Mick's?

A. Yes.

Q. What else?

A. Paint pots and hoses.

Q. Who owned that?

A. Bo-Mick.

Q. All right.

A. Spray guns.

Q. That was Bo-Mick's also?

A. Yes, all their equipment.

Q. All right.

A. All our paint and sand was on there.

* * *

(p. 38) A. Yes.

Q. Would you bring your lunch with you?

A. Yes, sir.

Q. Did you have to buy your own lunch to bring out there?

A. Yes.

Q. And what time would the crewboat pick you up in the morning at Venice?

A. I believe it was 5:00 o'clock.

Q. At the time of your accident, what field were you working in or what area were you working in?

A. Well, it was in Black Bay.

Q. That's not what you would consider offshore, is it?

A. I really don't know. It's offshore, but I don't know – I think it's about 30 miles out there.

Q. Well, how long of a ride is it from Venice for you to get to the field?

A. 45 minutes, I believe it was.

Q. And Black Bay, can you see land when you're in Black Bay?

* * *

(p. 43) Q. Are the structures pretty close together out there?

A. Yeah, they're not far apart.

Q. And the work on all of these was sandblasting and then painting; is that correct?

A. Yes.

Q. Now, as far as the crewboat ride, you didn't have to drive the crewboat at all, did you?

A. No, sir.

Q. Now, the sandblasting and painting work that you did on the structures during the time you worked for Bo-Mick in the Black Bay field, did you ever have to work on the barge itself, stand on the barge itself to do the work on the platform, or did you get off of the barge to do your work?

A. Most of the time you just – you don't work on the barge. You have to paint on the platform. I don't remember ever working off of the barge to get to nothing.

Q. Now, when you got to a (p. 44) platform, did the operator or the captain or the skipper of the work barge always jack up?

A. He jacked it up level with where you got off at.

Q. So the skipper of the work barge would jack the deck of the barge up to the level of the platform so you could be even with that level?

A. Right. Yes, sir.

Q. And I presume this barge only had one deck; is that correct?

A. That's all.

Q. And the engine room was below that deck?

A. Yes, sir.

Q. And the hull itself?

A. Yes.

Q. Did you ever take your equipment, your sand pots or your paint pots off of the barge and put it on the platform to do your work or did it always remain on the deck of the barge?

A. The only thing we took off of the barge was our paint pot. It was a (p. 45) small two-gallon paint pot. We had to take them on the platform with us.

Q. As far as the sandblasting is concerned, the sandblast pots and the compressor would remain on the barge?

A. Yes, sir.

Q. And I suppose there would be rubber hoses that went across to the platform, to the guns themselves?

A. Right.

Q. Did the helper ever do any sandblasting or painting?

A. No.

Q. Was his job just to keep the pots filled and make sure the equipment was running?

A. Yes, sir. He shoveled sand, he tailed our paint lines, helped us tape gauges and stuff, and then when we sandblasted, he had to run the pot on the barge.

Q. So he would make sure the pot was full of sand?

A. Yeah, fill it up and turn it on and off.

* * *

(p. 58) didn't jack it down. It stayed up two foot over the piling. Roughly, I say two foot. I don't think it was no more than that.

Q. Let me just label this real quick here. I'm going to label this, the platform itself, and you called this one – with an arrow, I'm going to put the porch and this one is the barge.

A. Yes, sir.

Q. And then I'll draw an arrow to these two and we'll call those the pilings. All right. So normally in the afternoon or the evening when you would leave, the captain of the barge would jack it up over the pilings, which you said were about two feet above the porch or so?

A. Yeah, he jacked it up, I guess, four foot.

Q. And then in the morning when you would come back, how would he get from the crewboat onto the barge to jack it down?

A. Well, we would just step off of the boat. They were about level with (p. 59) the crew boat on the bow. Just step right up there.

Q. So you could step from the bow of the crewboat onto the barge without any trouble?

A. Yeah.

Q. And then normally the captain of the barge would lower the barge down so it would be even with the walkway of the porch, right, or the surface of the porch?

A. Right.

Q. Had you ever had any problem on the days before this accident getting across from the barge to the porch when it was jacked down level with the porch?

A. No, never had any problem.

Q. Was there a gap between the barge and the porch, I mean a distance between the barge and the porch, or was it flush against it?

A. It was flush against it.

Q. So it was almost like one surface at that time?

A. Oh, yeah.

Q. The pilings didn't get in the

* * *

(p. 65) about two foot above the –

A. I estimated about two foot.

Q. Now, at what point in time was it that you asked the captain to jack down the barge? Was it when you first got out there?

A. Yeah, before we got off of it.

Q. So that was just before you got off of it at 9:30 or so?

A. Yes.

Q. And what exactly did you ask him?

A. I asked him to lower – I told him we was ready and asked him to lower the barge.

Q. What was his response to you?

A. I don't know. I assumed he was working down below, so –

Q. Well, where was he when you asked him?

A. On the deck.

Q. And you asked him to lower the barge down?

A. Yes.

Q. And he said nothing? I mean

* * *

(p. 68) pick up something. I just don't remember what. I done something. I don't remember what it was.

Q. How many times did you go back and forth across from the barge to the porch on that day before you had your accident?

A. The day before?

Q. No, before you had your accident. In other words, you went safely across that morning with the paint?

A. I imagine about four or five times.

Q. So you went back and forth four or five times safely without falling?

A. Yeah.

Q. Without falling?

A. Yes.

Q. Do you remember how many times you went back and forth? Was that normal practice?

A. That was normal practice.

Q. You could be going to get equipment or paint?

A. Yeah, sometimes a wrench or (p. 69) sometimes a tip cleaner or get a drink of water or anything. You know, you just made a lot of trips back and forth.

Q. About what time of day was it that you had your accident?

A. I think it was 10:00 o'clock.

Q. 10:00 o'clock in the morning?

A. Yes.

Q. What was the weather like on that day?

A. Something like this, I think. I don't remember.

Q. Was it raining?

A. No, it wasn't raining.

Q. Was it a nice day, bright and sunny day?

A. Yeah. You couldn't paint when it rains.

Q. So it must have been a nice, sunny, bright day?

A. Yeah.

Q. Do you remember whether it was cold or hot or –

A. It wasn't cold. I just don't remember.

* * *

(p. 75) there?

A. No, sir.

Q. And there wasn't any paint pots or other equipment there?

A. No.

Q. Just flat deck?

A. Yes, sir.

Q. Okay, so as you got to the edge of the barge, what foot did you step down on the piling with?

A. My right foot.

Q. Did you get your right foot on the piling safely?

A. It slipped off when I put my right foot on it. That's when it slipped off of there, and then I fell sitting down on the piling, and trying to grab myself it kind of threw me off and I fell in the water.

Q. When you stepped down with your right foot, did you say you didn't know whether you tripped or slipped?

A. I don't remember. It happened so fast, I don't know whether I just stepped on the edge or what happened, but

* * *

(p. 130) Q. And did it consist mostly of painting and sandblasting offshore production facilities?

A. Yes.

Q. How did you learn of where you had to go or what particular platforms had to be painted?

A. Them boat captains knows the name of them platforms and how to get to them, and that's how we – I mean I'm not navigator.

Q. Where would you report in the mornings, generally speaking? Would you go to the Bo-Mick office every morning?

A. No, sir, we would go to the boat docks in Buras where they dock their crewboats and catch our boat there every morning, and it let us back down that night.

Q. I'm a little confused about the situation of the structure and the barge. Now, you suggested that the little porch was about five steps or so below the main deck of the platform; is that correct?

APPENDIX B

STATE OF LOUISIANA :
:
PARISH OF CALCASIEU :

BEFORE ME, the undersigned authority, personally came and appeared MANSEL J. LAFLEUR, who, after being duly sworn deposed and said:

That as a member of the crew of the M/V L/B GEAR ELEVATOR, he spent a great deal of time, as many as 40 to 50 times a day walking from the platform to the L/B GEAR ELEVATOR.

Affiant further states that the sandblasting materials and all of the work equipment were maintained on the L/B GEAR ELEVATOR and the sandblasting hose and painting hose was continually attached to the L/B GEAR ELEVATOR and that he worked primarily with this hose.

Affiant further states that the mission of the L/B GEAR ELEVATOR was to perform and complete the sandblasting and painting activities and that the L/B GEAR ELEVATOR was used as a support vessel to this mission of painting and sandblasting.

Affiant further states that at the conclusion of the sandblasting and painting job the L/B GEAR ELEVATOR'S mission would be concluded.

During his employment affiant worked off of two main support vessels; however, the primary vessel he worked off of was the L/B GEAR ELEVATOR.

/s/ Mansel J. LaFleur
MANSEL J. LAFLEUR

SWORN TO AND SUBSCRIBED before me, Notary Public, at Lake Charles, Louisiana this 30th day of October, 1987.

/s/ Robert C. McCall
NOTARY PUBLIC

APPENDIX C

(p. 13) A We'll he was kind of a skinny guy. He wasn't too big, you know.

Q Had this helper been working with you for some period of time before?

A Well he hadn't been out too long, I don't believe.

Q How long had you and Mr. LaFleur worked together?

A We worked awhile. I imagine two or three weeks. A couple of weeks anyway.

Q Mr. Creel, at the time of the accident, you were working for P & S Well Service; is that correct?

A Right. But the barge was rented to Bo-Mick. We rented the barge to Bo-Mick.

Q And who was Mr. LaFleur and his helper working for?

A Bo-Mick.

Q And what was the relationship as far as taking orders or giving orders between you and the painters, Mr. LaFleur and his helper?

A Mr. LaFleur was the boss. He was a (p. 14) supervisor himself, not me. I just drove the barge for him.

Q Now, as far as the operation of the barge itself, I take it you would be the –

A That's my responsibility, right.

Q Did ya'll ever have any problems in this line at all?

A Never did.

Q Did you assist Mr. LaFleur in the painting operations?

A Yeah. I helped him. I've helped him some out there. Then he got his helper, and I'd just run the barge.

Q Was there any particular reason why you had quit helping him at this particular time?

A No.

Q Had there been a change in the company you were working for shortly before this?

A No.

Q Had there been any kind of change in the policy as far as the skipper helping the painters?

* * *

(p. 42) believe it was diesel. I'm pretty sure it was diesel.

Q The hoses then extend on up to the platform –

A Right.

Q How long are those hoses?

A Oh, they got different sizes. Just however long they have to have it. They got a bunch of hoses on there.

Q And all of that equipment, the hoses and stuff, stays on your barge?

A Right.

Q When the painter and his helper are doing sand-blasting, is that similarly connected with hoses back to an air compressor?

A Right.

Q Is the same air compressor used for both of those jobs?

A Yes, sir.

Q As far as eating, what did ya'll do?

A Bring lunches out.

Q Did you make out any sort of accident report for your company concerning this accident?

* * *

(p. 46) tickets?

A Well, I couldn't tell you what he does with them. I just give them to him. What they do with them, I don't know.

Q Do you know on the date of the accident whether the P & S barge that you were working on – did it have a name, by the way?

A Yeah. GEAR ELEVATOR was the name of it.

Q That's a particular name; that's not the style? That's the name of that particular barge?

A That's the name of the vessel, right.

Q Was the GEAR ELEVATOR under contract with Gulf Oil Corporation on the day of this incident?

A No. It was through Bo-Mick.

Q How do you know that?

A Because I made out the tickets to Bo-Mick.

Q Is that the only information you have that would lead you to believe that it was working for Bo-Mick and not for Gulf?

APPENDIX D

43 USC § 1333

(b) **Longshoremen's and Harbor Workers' Compensation Act applicable; definitions.** With respect to disability or death of an employee resulting from any injury occurring as the result of operations, conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the outer Continental Shelf compensation shall be payable under the provisions of the Longshoremen's and Harbor Workers' Compensation Act [33 USCS §§ 901 et seq.]. For the purposes of the extension of the provisions of the Longshoremen's and Harbor Workers' Compensation Act [33 USCS §§ 901 et seq.] under this section –

(1) the term "employee" does not include a master or member of a crew of any vessel, or an officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof;

(2) the term "employer" means an employer any of whose employees are employed in such operations; and

(3) the term "United States" when used in a geographical sense includes the outer Continental Shelf and artificial islands and fixed structures thereon.